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MEMO TO: LAW SOCIETY OF NUNAVUT
FROM: MEGHAN C. ROSS
RE: COMPARISON OF FLSC MODEL CODE AND
NUNAVUT LEGISLATION
OUR MATTER NO. 0182391 SRP/MCR
DATE: FEBRUARY 1, 2023

You have requested that we analyze the amendments to the Federation of Law Societies of Canada's Model Code of Professional Conduct (the "FLSC Model Code") and its interaction with current Nunavut legislation. The Model Code was amended in and around October 2022 in two sections: (1) discrimination and harassment, and (2) *ex parte* communications. In brief, we note:

- 1) The Law Society of Nunavut's Code of Professional Conduct (the "LSN Code") largely mirrors the past version of the FLSC Model Code;
- 2) The updated FLSC Model Code significantly added to the discrimination and harassment section, and entirely added the *ex parte* communications section; and
- 3) The updated FLSC Model Code is generally in line with current Nunavut legislation.

DISCRIMINATION AND HARASSMENT

Previously, the FLSC Model Code contained very basic sections on discrimination and harassment, which provided:

6.3 HARASSMENT AND DISCRIMINATION

6.3-1 The principles of human rights laws and related case law apply to the interpretation of this rule.

6.3-2 A term used in this rule that is defined in human rights legislation has the same meaning as in the legislation.

6.3-3 A lawyer must not sexually harass any person.

6.3-4 A lawyer must not engage in any other form of harassment of any person.

6.3-5 A lawyer must not discriminate against any person.

Commentary

[1] A lawyer has a special responsibility to respect the requirements of human rights laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights laws.

The October 2022 update inserted significantly more detailed sections. The LSN Code continues to mirror the previous FLSC Model Code, in that it contains very basic sections on discrimination and harassment. The Nunavut Human Rights Act provides similar, but more general sections on discrimination, harassment, and reprisal. The Occupational Health and Safety Regulations additionally provides similar, but more workplace tailored sections on harassment. Neither the Nunavut Human Rights Act nor the Occupational Health and Safety Regulations address sexual harassment explicitly.

The following table compares the October 2022 update with current Nunavut legislation:

FLSC MODEL CODE	LSN CODE	THE NUNAVUT HUMAN RIGHTS ACT	OCCUPATIONAL HEALTH AND SAFETY REGULATIONS
DISCRIMINATION			
<p>Discrimination</p> <p>6.3-1 A lawyer must not directly or indirectly discriminate against a colleague, employee, client or any other person.</p> <p>Commentary</p> <p>[1] Lawyers are uniquely placed to advance the administration of justice, requiring lawyers to commit to equal justice for all within an open and impartial system. Lawyers are expected to respect the dignity and worth of all persons and to treat all persons fairly and without discrimination. A lawyer has a special responsibility to respect and uphold the principles and requirements of human</p>	<p>6.3-1 The principles of human rights laws and related case law apply to the interpretation of this rule.</p>	<p>Prohibited grounds of discrimination</p> <p>7.(1) For the purposes of this Act, the prohibited grounds of discrimination are race, colour, ancestry, ethnic origin, citizenship, place of origin, creed, religion, age, disability, sex, sexual orientation, gender identity, gender expression, marital status, family status, pregnancy, lawful source of income and a conviction for which a pardon has been granted.</p> <p>Intent</p> <p>8. Discrimination on the basis of one or more prohibited grounds is a contravention of this Act</p>	<p>N/A</p>

<p>rights and workplace health and safety laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in such laws.</p> <p>[2] In order to reflect and be responsive to the public they serve, a lawyer must refrain from all forms of discrimination and harassment, which undermine confidence in the legal profession and our legal system. A lawyer should foster a professional environment that is respectful, accessible, and inclusive, and should strive to recognize their own internal biases and take particular care to avoid engaging in practices that would reinforce those biases, when offering services to the public and when organizing their workplace.</p> <p>[3] Indigenous peoples may experience unique challenges in relation to discrimination and harassment as a result of the history of the colonization of Indigenous peoples in Canada, ongoing repercussions of the colonial legacy, systemic factors, and implicit biases. Lawyers should take particular care to avoid engaging in,</p>		<p>whether or not there is an intention to discriminate.</p> <p>9.(1) No person shall, on the basis of a prohibited ground of discrimination:</p> <p>(a) refuse to employ or refuse to continue to employ an individual or a class of individuals; or</p> <p>(b) discriminate against any individual or class of individuals in regard to employment or any term or condition of employment, whether the term or condition was prior to or is subsequent to the employment.</p> <p>Duty to Accommodate</p> <p>(5) When a practice referred to in subsection (1) results in discrimination, in order for it to be considered to be based on a justified occupational requirement, it must be established that accommodation of the needs of an individual or class of individuals affected would impose undue hardship on a person who would have to accommodate those needs.</p>	
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<p>allowing, or being willfully blind to actions which constitute discrimination or any form of harassment against Indigenous peoples.</p> <p>[4] Lawyers should be aware that discrimination includes adverse effect and systemic discrimination, which arise from organizational policies, practices and cultures that create, perpetuate, or unintentionally result in unequal treatment of a person or persons. Lawyers should consider the distinct needs and circumstances of their colleagues, employees, and clients, and should be alert to unconscious biases that may inform these relationships and that serve to perpetuate systemic discrimination and harassment. Lawyers should guard against any express or implicit assumption that another person's views, skills, capabilities, and contributions are necessarily shaped or constrained by their gender, race, Indigeneity, disability or other personal characteristic.</p> <p>[5] Discrimination is a distinction, intentional or not, based on grounds related to actual or</p>			
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perceived personal characteristics of an individual or group, which has the effect of imposing burdens, obligations or disadvantages on the individual or group that are not imposed on others, or which withhold or limit access to opportunities, benefits and advantages that are available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will typically constitute discrimination. Intersecting grounds of discrimination require consideration of the unique oppressions that result from the interplay of two or more protected grounds in a given context.

[6] The principles of human rights and workplace health and safety laws and related case law apply to the interpretation of this Rule and to Rules 6.3-2 to 6.3-4. A lawyer has a responsibility to stay apprised of developments in the law pertaining to discrimination and harassment, as what constitutes discrimination, harassment, and protected grounds continue to evolve

<p>over time and may vary by jurisdiction.</p> <p>[7] Examples of behaviour that constitute discrimination include, but are not limited to:</p> <p>a. harassment (as described in more detail in the Commentary to Rules 6.3-2 and 6.3-3);</p> <p>b. refusing to employ or to continue to employ any person on the basis of any personal characteristic protected by applicable law;</p> <p>c. refusing to provide legal services to any person on the basis of any personal characteristic protected by applicable law;</p> <p>d. charging higher fees on the basis of any personal characteristic protected by applicable law;</p> <p>e. assigning lesser work or paying an employee or staff member less on the basis of any personal characteristic protected by applicable law;</p> <p>f. using derogatory racial, gendered, or religious language to describe a person or group of persons;</p> <p>g. failing to provide reasonable</p>			
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<p>accommodation to the point of undue hardship;</p> <p>h. applying policies regarding leave that are facially neutral (i.e. that apply to all employees equally), but which have the effect of penalizing individuals who take parental leave, in terms of seniority, promotion or partnership;</p> <p>i. providing training or mentoring opportunities in a manner which has the effect of excluding any person from such opportunities on the basis of any personal characteristic protected by applicable law;</p> <p>j. providing unequal opportunity for advancement by evaluating employees on facially neutral criteria that fail to take into account differential needs and needs requiring accommodation;</p> <p>k. comments, jokes or innuendos that cause humiliation, embarrassment or offence, or that by their nature, and in their context, are clearly embarrassing, humiliating or offensive;</p> <p>l. instances when any of the above behaviour is directed toward someone</p>			
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<p>because of their association with a group or individual with certain personal characteristics; or</p> <p>m. any other conduct which constitutes discrimination according to any applicable law.</p> <p>[8] It is not discrimination to establish or provide special programs, services or activities which have the object of ameliorating conditions of disadvantage for individuals or groups who are disadvantaged for reasons related to any characteristic protected by applicable laws.</p> <p>[9] Lawyers are reminded that the provisions of this Rule do not only apply to conduct related to, or performed in, the lawyer's office or in legal practice.</p>			
HARASSMENT			
<p>Harassment</p> <p>6.3-2 A lawyer must not harass a colleague, employee, client or any other person.</p> <p>Commentary</p> <p>[1] Harassment includes an incident or a series of incidents involving physical, verbal or non-verbal conduct (including electronic communications) that</p>	<p>6.3-2 A term used in this rule that is defined in human rights legislation has the same meaning as in the legislation.</p>	<p>"harass" means to engage in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.</p> <p>Harassment</p> <p>7.(6) No person shall, on the basis of a prohibited ground of discrimination, harass any individual or class of individuals:</p>	<p>34.(1) In this section, "harassment" means, subject to subsections (2) and (3), a course of vexatious comment or conduct at a work site that:</p> <p>(a) is known or ought to be known to be unwelcome; and</p> <p>(b) constitutes a threat at the work site to the health or safety of a worker.</p>

<p>might reasonably be expected to cause humiliation, offence or intimidation to the person who is subjected to the conduct. The intent of the lawyer engaging in the conduct is not determinative. It is harassment if the lawyer knew or ought to have known that the conduct would be unwelcome or cause humiliation, offence or intimidation. Harassment may constitute or be linked to discrimination.</p> <p>[2] Examples of behaviour that constitute harassment include, but are not limited to:</p> <p>a. objectionable or offensive behaviour that is known or ought reasonably to be known to be unwelcome, including comments and displays that demean, belittle, intimidate or cause humiliation or embarrassment;</p> <p>b. behaviour that is degrading, threatening or abusive, whether physically, mentally or emotionally;</p> <p>c. bullying;</p> <p>d. verbal abuse;</p>		<p>(a) in the provision of goods, services, facilities or contracts;</p> <p>(b) in the provision of commercial premises or residential accommodation;</p> <p>(c) in matters related to employment; or</p> <p>(d) in matters related to membership in an employees' organization, trade union, trade association, occupational or professional association or society, employers' organization or co-operative association or organization.</p>	<p>(2) To constitute harassment for the purposes of subsection (1), any one of the following must have occurred:</p> <p>(a) repeat conduct, comments, displays, actions or gestures; or</p> <p>(b) a single, serious occurrence of conduct, or a single, serious comment, display, action or gesture, that has a lasting, harmful effect on the worker's health or safety.</p> <p>(3) For the purpose of subsection (1), harassment does not include reasonable action taken by an employer or supervisor relating to the management and direction of the workers or of the work site.</p> <p>(4) An employer shall, in consultation with the Committee or representative, or, if no Committee or representative is available, the workers, develop and implement a written policy that includes:</p> <p>(a) a definition of harassment that is consistent with subsection (1), (2), and (3);</p>
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<p>e. abuse of authority where a lawyer uses the power inherent in their position to endanger, undermine, intimidate, or threaten a person, or otherwise interfere with another person's career;</p> <p>f. comments, jokes or innuendos that are known or ought reasonably to be known to cause humiliation, embarrassment or offence, or that by their nature, and in their context, are clearly embarrassing, humiliating or offensive; or</p> <p>g. assigning work inequitably.</p> <p>[3] Bullying, including cyberbullying, is a form of harassment. It may involve physical, verbal or non-verbal conduct. It is characterized by conduct that might reasonably be expected to harm or damage the physical or psychological integrity of another person, their reputation or their property. Bullying includes, but is not limited to:</p> <p>a. unfair or excessive criticism;</p> <p>b. ridicule;</p> <p>c. humiliation;</p>			<p>(b) a statement that each worker is entitled to work free of harassment;</p> <p>(c) a commitment that the employer will make every reasonable effort to ensure that workers are not subjected to harassment;</p> <p>(d) a commitment that the employer will take corrective action respecting any individual who subjects any worker to harassment;</p> <p>(e) an explanation of how harassment complaints may be brought to the attention of the employer;</p> <p>(f) a statement that the employer will not disclose the name of a complainant or an alleged harasser or the circumstances relating to the complaint to a person unless disclosure is (i) necessary for the purposes of investigating the complaint or taking corrective action with respect to the complaint, or (ii) required by law;</p> <p>(g) a description of the procedure that the employer will follow to inform a complainant and alleged harasser of the results of an investigation; and</p> <p>(h) a statement that the employer's harassment</p>
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<p>d. exclusion or isolation;</p> <p>e. constantly changing or setting unrealistic work targets; or</p> <p>f. threats or intimidation.</p> <p>[4] Lawyers are reminded that the provisions of this Rule do not only apply to conduct related to, or performed in, the lawyer's office or in legal practice.</p>			<p>policy is not intended to discourage or prevent a complainant from exercising other legal rights.</p> <p>(5) An employer shall make readily available to workers a copy of the policy required under subsection (4).</p>
SEXUAL HARASSMENT			
<p>Sexual Harassment</p> <p>6.3-3 A lawyer must not sexually harass a colleague, employee, client or any other person.</p> <p>Commentary</p> <p>[1] Sexual harassment is an incident or series of incidents involving unsolicited or unwelcome sexual advances or requests, or other unwelcome physical, verbal, or nonverbal conduct (including electronic communications) of a sexual nature. Sexual harassment can be directed at others based on their gender, gender identity, gender expression, or sexual orientation. The intent of the lawyer engaging in the conduct is not determinative. It is sexual</p>	<p>6.3-3 A lawyer must not sexually harass any person.</p>	N/A	N/A



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<p>harassment if the lawyer knew or ought to have known that the conduct would be unwelcome. Sexual harassment may occur:</p> <p>a. when such conduct might reasonably be expected to cause insecurity, discomfort, offence, or humiliation to the person who is subjected to the conduct;</p> <p>b. when submission to such conduct is implicitly or explicitly made a condition for the provision of professional services;</p> <p>c. when submission to such conduct is implicitly or explicitly made a condition of employment;</p> <p>d. when submission to or rejection of such conduct is used as a basis for any employment decision, including;</p> <p>i. Loss of opportunity;</p> <p>ii. The allocation of work;</p> <p>iii. Promotion or demotion;</p> <p>iv. Remuneration or loss of remuneration;</p> <p>v. Job security; or</p> <p>vi. Benefits affecting the employee;</p>			
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<p>e. when such conduct has the purpose or the effect of interfering with a person's work performance or creating an intimidating, hostile, or offensive work environment;</p> <p>f. when a position of power is used to import sexual requirements into the workplace and negatively alter the working conditions of employees or colleagues; or</p> <p>g. when a sexual solicitation or advance is made by a lawyer who is in a position to confer any benefit on, or deny any benefit to, the recipient of the solicitation or advance, if the lawyer making the solicitation or advance knows or ought reasonably to know that it is unwelcome.</p> <p>[2] Examples of behaviour that constitute sexual harassment include, but are not limited to:</p> <p>a. displaying sexualized or other demeaning or derogatory images;</p> <p>b. sexually suggestive or intimidating comments, gestures or threats;</p> <p>c. comments, jokes that cause humiliation, embarrassment or offence, or which by their nature,</p>			
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<p>and in their context, are clearly embarrassing, humiliating or offensive;</p> <p>d. innuendoes, leering or comments about a person's dress or appearance;</p> <p>e. gender-based insults or sexist remarks;</p> <p>f. communications with sexual overtones;</p> <p>g. inquiries or comments about a person's sex life;</p> <p>h. sexual flirtations, advances, propositions, invitations or requests;</p> <p>i. unsolicited or unwelcome physical contact or touching;</p> <p>j. sexual violence; or</p> <p>k. unwanted contact or attention, including after the end of a consensual relationship.</p> <p>[3] Lawyers should avoid condoning or being willfully blind to conduct in their workplaces that constitutes sexual harassment.</p> <p>[4] Lawyers are reminded that the provisions of this Rule do not only apply to conduct related to, or</p>			
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performed in, the lawyer's office or in legal practice.			
REPRISAL			
<p>Reprisal</p> <p>6.3-4 A lawyer must not engage or participate in reprisals against a colleague, employee, client or any other person because that person has:</p> <p>a. inquired about their rights or the rights of others;</p> <p>b. made or contemplated making a complaint of discrimination, harassment or sexual harassment;</p> <p>c. witnessed discrimination, harassment or sexual harassment; or</p> <p>d. assisted or contemplated assisting in any investigation or proceeding related to a complaint of discrimination, harassment or sexual harassment.</p> <p>Commentary</p> <p>[1] The purpose of this Rule is to enable people to exercise their rights without fear of reprisal. Conduct which is intended to retaliate against a person, or discourage a person from exploring their rights, can constitute reprisal. Examples of such</p>	<p>6.3-4 A lawyer must not engage in any other form of harassment of any person.</p> <p>6.3-5 A lawyer must not discriminate against any person.</p> <p>Commentary</p> <p>[1] A lawyer has a special responsibility to respect the requirements of human rights laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights laws.</p>	<p>Discharge, suspension and intimidation</p> <p>15. No person shall discharge, expel, evict, suspend, intimidate, coerce, impose any pecuniary penalty on, deny a right or benefit to or otherwise retaliate against any individual because the individual</p> <p>(a) has notified or attempted to notify the Tribunal with respect to a human rights issue under this Act;</p> <p>(b) has given evidence or otherwise participated in, or may give evidence or otherwise participate in, a proceeding under this Act; or</p> <p>(c) has assisted in any way in,</p> <p>(i) notifying or attempting to notify the Tribunal with respect to a human rights issue under this Act, or</p> <p>(ii) the settlement, investigation or adjudication of a notification under this Act.</p>	N/A

<p>behaviour include, but are not limited to:</p> <p>a. refusing to employ or to continue to employ any person;</p> <p>b. penalizing any person with respect to that person's employment or changing, in a punitive way, any term, condition or privilege of that person's employment;</p> <p>c. intimidating, retaliating against or coercing any person;</p> <p>d. imposing a pecuniary or any other penalty, loss or disadvantage on any person;</p> <p>e. changing a person's workload in a disadvantageous manner, or withdrawing opportunities from them; or</p> <p>f. threatening to do any of the foregoing.</p>			
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EX PARTE COMMUNICATIONS

Previously, the FLSC Model Code did not contain a section on *ex parte* communications. The October 2022 update inserted entirely new sections, which provide:

Ex Parte Proceedings

5.1-2B In an *ex parte* proceeding, a lawyer must act with utmost good faith and inform the tribunal of all material facts, including

adverse facts, known to the lawyer that will enable the tribunal to make an informed decision.

Commentary

[1] *Ex parte* proceedings are exceptional. The obligation to inform the tribunal of all material facts includes an obligation of full, fair and candid disclosure to the tribunal (see also Rules 5.1-1, 5.1-2).

[2] The obligation to disclose all relevant information and evidence is subject to a lawyer's duty to maintain confidentiality and privilege (see Rule 3.3).

[3] Before initiating *ex parte* proceedings, a lawyer should ensure that the proceedings are permitted by law and are justified in the circumstances. Where no prejudice would occur, a lawyer should consider giving notice to the opposing party or their lawyer (when they are represented), notwithstanding the ability to proceed *ex parte*.

Single-Party Communications with a Tribunal

5.1-2C Except where authorized by law, and subject to rule 5.1-2B, a lawyer must not communicate with a tribunal in the absence of the opposing party or their lawyer (when they are represented) concerning any matter of substance, unless the opposing party or their lawyer has been made aware of the content of the communication or has appropriate notice of the communication.

Commentary

[1] It is improper for a lawyer to attempt to influence, discuss a matter with, or make submissions to, a tribunal without the knowledge of the other party or the lawyer for the other party (when they are represented). A lawyer should be particularly diligent to avoid improper single-party communications when engaging with a tribunal by electronic means, such as email correspondence.

[2] When a tribunal invites or requests a communication from a lawyer, the lawyer should inform the other party or their lawyer. As a general rule, the other party or their lawyer should be copied on communications to the tribunal or given advance notice of the communication.

[3] This rule does not prohibit single-party communication with a tribunal on routine administrative or procedural matters, such as scheduling hearing dates or appearances. A lawyer should consider notifying the other party or their lawyer of administrative communications with the tribunal. Routine administrative communications should not include any submissions dealing with the substance of the matter or its merits.

[4] When considering whether single-party communication with a tribunal is authorized by law, a lawyer should review local rules, practice directives, and other relevant authorities that may regulate such a communication.

The LSN Code continues to mirror the previous FLSC Model Code, in that it does not provide for *ex parte* proceedings or single-party communications with a tribunal. We have not found any other Nunavut legislation that addresses these subjects.

MCR